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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 516.

HARRY J. JAQUITH, TRUSTEE, APPELLANT,

v.

G. EDWIN ALDEN, APPELLEE.

BRIEF FOR APPELLEE.

EUGENE M. JOHNSON,
ARTHUR T. JOHNSON,
ALONZO K. WEED,
Counsel for Appellee.

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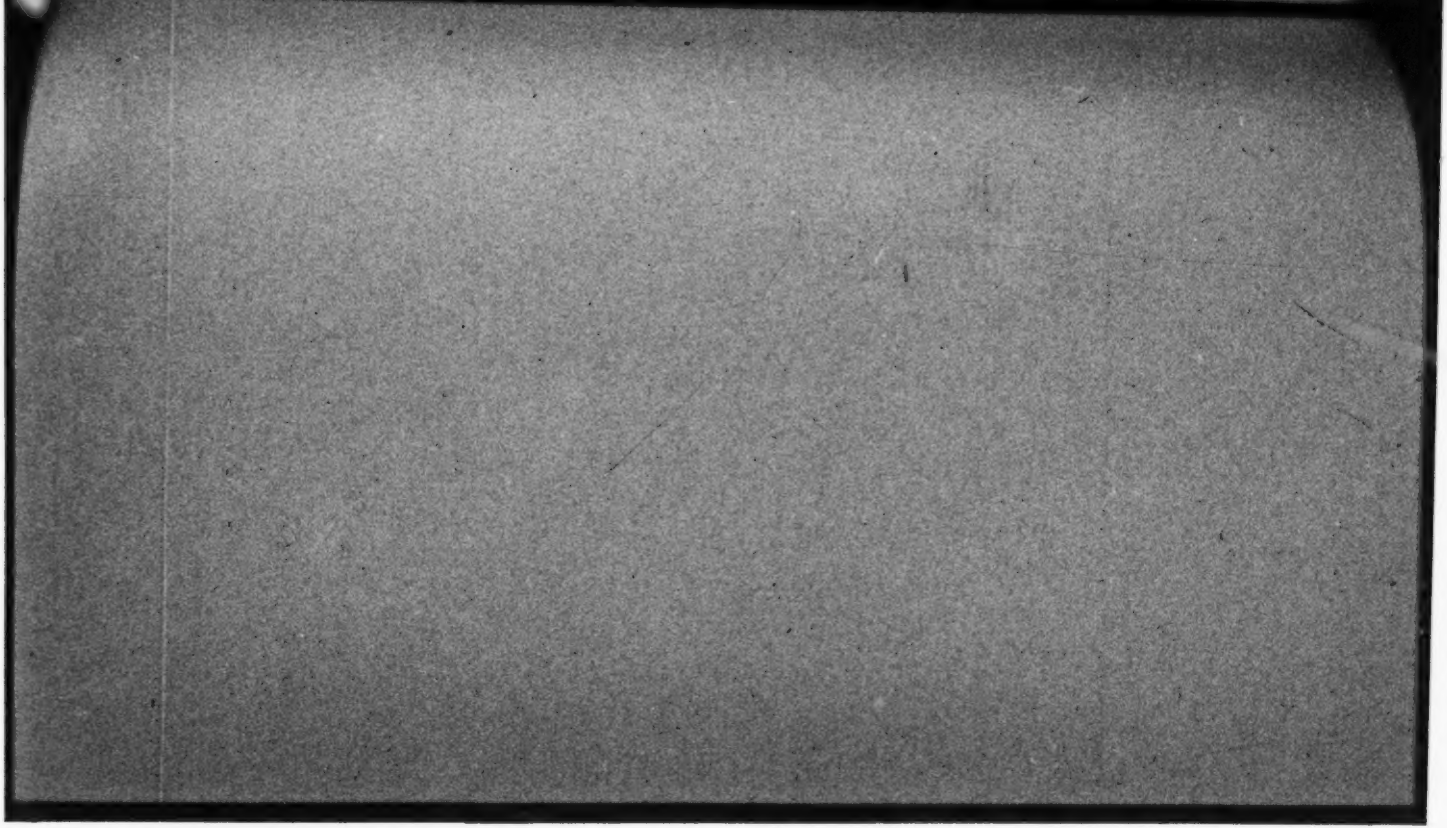

Supreme Court of the United States.

No. 516. October Term, 1902.

HARRY J. JAQUITH, Trustee, Appellant,

v.

G. EDWIN ALDEN, Appellee.

BRIEF FOR APPELLEE.

ARGUMENT.

I.

The Record, page 3, shows that all the transactions between the bankrupt and the appellee were after the occurrence of insolvency and within a period of four months prior to the adjudication. That the appellee was ignorant of the fact that the bankrupts were insolvent; that the sales were made and the payments received in the ordinary course of business, and without any intent to receive a preference on the part of the appellee; that the payments made were in each instance payments of single bills, and were made quite regularly, and also all the merchandise sold the bankrupts by the appellee was manufactured by them, and that the result of the transactions was to increase the estate which the bankrupts had at the time of the occurrence of insolvency.

II.

The appellee submits that the final judgment entered in the Circuit Court of Appeals was not "that the question of preference under the Bankruptcy Act depended upon whether on the date of the adjudication the appellee was owed more or less than was owed to him at a period exactly four months prior to the adjudication" as claimed in the appellant's third assignment of errors.

Record, page 11.

The Circuit Court of Appeals decided (Record, page 4) that the case was covered by the decision in Dickson *v.* Wyman, 111 Fed. Rep. 726.

In that case the Court said that whether the period of four months prior to the adjudication of bankruptcy, or the date of the actual occurrence of insolvency was taken into consideration, the net result of all the transactions between the creditor and the bankrupt was to increase the debt due the creditor and to correspondingly increase the bankrupt's estate, and therefore held that there was no preference.

In this case the insolvency occurred less than four months prior to the adjudication, that is, within the four-months period, the date of the occurrence of insolvency being Aug. 15, 1901, and the date of the adjudication being Nov. 26, 1901 (Record, page 3). Therefore there was no occasion for considering the beginning of the period of four months, but only the date of the occurrence of insolvency.

III.

The gist of the decision of the Circuit Court of Appeals in this case was that no preference, as defined in Sect. 60 (*a*) of the Act of 1898, was shown, and this is the first error assigned by the appellant. (Record, page 11.)

The appellee submits that this ruling was correct and that no preference was received by the appellee, and therefore that there was no occasion for the Court to consider Sect. 60 (*c*) of the Act of 1898, or any other sections referred to by the appellant.

The object of the Act "so far as the creditors are concerned is to secure equality of distribution among them of the property of the bankrupt, not among some of the creditors, but among all of them, which object could not be secured if there were no provisions against preferences."

Pirie *v.* Chicago Title & Trust Co., 182 U.S. 438–449.
Wilson *v.* City Bank, 17 Wall, 473.
Toof *v.* Martin, 13 Wall, 40–51.

The property which is to be distributed among the creditors is the property of which the bankrupt was possessed of at the date of the occurrence of insolvency.

The plain object and policy of an Insolvency Law is to require a debtor, as soon as he has reason to believe himself insolvent and before he has frittered away his property, to put himself and his assets at once into the hands of the law with the view to making an equal distribution of it among his creditors.

Fernald *v.* Gay, 12 Cush. 596.

From the moment of actual insolvency all creditors become entitled to share pro rata in the estate.

In re Knost 1 N.B.N. 403.

If this be so, then a creditor whose transactions are all had with the bankrupt after the date of the happening of insolvency, and consist of sales of merchandise which become a part of the estate of the bankrupt, is entitled to prove against the estate the amount which is due him at the time of the adjudication. He has not decreased the estate which the bankrupt had at the time of the insolvency; on the contrary, he has added to it property which is at least equal in value to the debt which he seeks to prove, and if he is allowed to prove he receives exactly the same proportion of his debt which the other creditors in his class receive. The result is not to give him a greater percentage of his debt than any other creditor of the same class, but exactly the same percentage.

A creditor to whom a debt is due at the time of the occurrence of insolvency, and to whom payments are made which are not balanced by corresponding unsecured credits given by him to the bankrupt, if he be allowed to prove without returning the payments received by him after the date of the occurrence of insolvency diminishes the estate which the bankrupt had upon the date of the occurrence of insolvency, and receives a greater proportion of his debt (if he receive the same dividend that other creditors in his class receive) than such other creditors in his class.

He receives, in other words, the dividend plus the payments which have been made to him after the occurrence of insolvency.

In such a case the object of the Act would be defeated were the transactions not held to be preferences.

A preference is an advantage secured by the creditor, the obtaining by the creditor of more than his share of the estate which the bankrupt had upon the date of the occurrence of insolvency.

In re Hapgood, Fed. Cas. 6044.

A creditor whose transactions are all after the occurrence of insolvency receives no advantage if the net result of his dealings with the bankrupt is to create a debt due from the bankrupt. In such a case the creditor has increased the estate at least by the amount of the payments received by him; therefore, if he proves his debt and receives a dividend, he receives only his *pro rata* share.

In this case the debt due the appellee, and which he is entitled to prove, is the debt due him at the time of the adjudication. He is entitled to the same percentage of this debt as any other creditor of the same class.

To illustrate: Suppose another creditor whose dealings with the bankrupt were exactly the same as those of the appellee, except that all of his sales and payments occurred prior to the date of insolvency. Suppose that the transactions between this imaginary creditor and the bankrupt resulted in a debt which exactly equalled in amount the debt which the appellee seeks to prove in this case, and was due to the imaginary creditor at the date of the actual occurrence of bankruptcy. Under the contention of the appellant such imaginary creditor might prove his claim, though the appellee may not.

There is no sound ground for any distinction between them on any theory. The appellee has contributed to the

estate which is to be divided among the creditors exactly the same amount and should receive the same dividend.

IV.

In order to support the contention of the appellant it is necessary for him to arbitrarily separate the account between the bankrupts and the appellee, and to arbitrarily assume that an amount which happened to be due to the appellee at one particular stage of the transactions between him and the bankrupts is the debt of the appellee within the meaning of the language of Sect. 60 (*a*) of the Act.

Appellant's Brief, page 7.

Such a construction of the Act is manifestly absurd and unjust, and would result in endless confusion.

In Kimball *v.* Rosenham, 114 Fed. Rep. 85–87, to a similar contention, the Court says: "It may be said that before the $850 was paid, the claim of the Rosenham Co. was about $2,728.13; that after its payment it was only $1,878.13, and that the moment the payment was made the creditor had secured thereby a preference. This would undoubtedly have been true if the account and the transaction had closed there. But it did not, and it is the actual account and the real transaction, and not those which might have been but were not, that condition this case and this decision."

V.

Whether or not the appellee shall be deemed to have received a preference which must be surrendered before he can prove his claim, depends upon the interpretation

of Sect. 60 (*a*) of the Act. That section provides that "a person shall be deemed to have given a preference if, *being insolvent*, he has procured or authorized a judgment to be entered against him in favor of any person, or *made a transfer of any of his property, and the effect of* the enforcement of *such* judgment or *transfer* will be to enable any one of his creditors to obtain a *greater percentage of his debt* than any other of such creditors of the same class."

This Court in the case of Pirie *v.* Chicago Title & Trust Co., 182 U.S. 438, determined (1) that a payment of money is a transfer of property within the meaning of this section of the Act; (2) that such payment is a preference irrespective of the intention with which it is given or received.

The Record in that case does not disclose any sales of merchandise made by the creditors to the bankrupts after the occurrence of actual insolvency and within the four months period, but simply the receipt of payments by the creditor from the bankrupt during that period by which the estate of the bankrupts was correspondingly diminished and the creditor thereby enabled to obtain a greater percentage of the debt due him at the beginning of the period than any other creditors of the same class to whom debts were then due and who received no such payments.

The appellee submits that the proposition contended for by him is in no way inconsistent with the opinion of this Court in that case. It is obvious that in that case, if the creditor was allowed to prove and to retain the payments received by him after the occurrence of insolvency and within the four months period, he would have received

a greater percentage of his debt than any other creditor of the same class.

If the record in that case had shown that after the occurrence of insolvency the creditor had made sales to the bankrupt equal to, or greater in amount than the payments received by him, so that the estate of the bankrupt had been in no way diminished, the appellee submits that in that case there would have been no preference.

VI.

The appellee submits that a study of certain other sections of the Act, to wit, of Sect. 3, which defines the acts of bankruptcy; of Sect. 60 (*b*) and (*c*) which provide for the recovery of preferences; of Sect. 67, Clauses (*c*) and (*e*), relative to liens; and of Sect. 68 (*c*) relative to set off; makes it clear that it was the purpose of the Act to fix the date of the occurrence of actual insolvency as the date by reference to which the rights of creditors to share in the distribution of the estate is to be determined. The plain purpose of the provisions for the surrender of innocent preferences before proof and the recovery of fraudulent preferences is to restore as far as practicable the conditions as they existed at the time of actual insolvency.

Lowell on Bankruptcy, Chap. 5 (relative to preferences).

Whether or not the inquiry as to the date of the occurrence of actual insolvency can be carried farther back than a date which is four months prior to the date of the adjudication is not raised by the record in this case, nor is it material. It may well be that considerations of convenience or public policy dictated the fixing of the

date four months prior to the filing of the petition as one back of which no inquiry shall be made, and perhaps under the provisions of the Act it is to be arbitrarily assumed that where the date of the insolvency cannot be fixed within the period of four months prior to the filing of the petition it shall be assumed to have occurred on a date which is just four months prior to the date of the filing of the petition. But where, as in this case, the actual date of the occurrence of insolvency is fixed within the period of four months, the appellee submits that it is the object of the Act to restore the estate as near as may be to the condition in which it was upon the date of the occurrence of insolvency, and to distribute that estate *pro rata* among the creditors who have claims against it upon the date of the adjudication of bankruptcy.

In the case at bar the rights of the creditors to share in the estate is to be determined as of the fifteenth day of August, 1901, when the bankrupts became insolvent. There was then no debt due the appellee. By reason of the transactions occurring thereafter between the bankrupts and the appellee, the estate of the bankrupts was increased to the extent of the amount of the debt which the appellee seeks to prove, and he is clearly entitled to his *pro rata* share of the debt which, as a result of all the transactions, was due him at the time of the adjudication.

VII.

The appellee respectfully submits that the appellant is in error in assuming that the sales of August 17 and August 28, amounting to $947.35, is the debt of the appellee within the meaning of Sect. 60 (*a*) of the Act,

and that without this assumption and also the acceptance of his proposition that a payment not for a present consideration is a preference, his argument and theory fails.

The appellee further submits that there is no question of set-off presented by this Record, and that no question of set-off under Sect. 60 (*c*) can arise until it is first determined whether or not there is a preference as defined in Sect. 60 (*a*).

It has been repeatedly decided by the several Circuit Courts of Appeal that, recognizing the authority of the Pirie case, that every payment made by an insolvent debtor to his creditor, within four months of the filing of the petition, is not necessarily a preference, unless taking all the transactions between the parties into account the payments, or some of them, enable the creditor to obtain a greater percentage of his debt than other creditors of the same class.

Dickson *v.* Wyman, 111 Fed. Rep. 726.
Kimball *v.* Rosenham, 114 Fed. Rep. 85.
Morey *v.* Shiffer, 114 Fed. Rep. 447.
Ganns *v.* Ellison, 114 Fed. Rep. 734.
Schwartz *v.* Fourth National Bank, 117 F. R. 1.
Schwartz *v.* Seegal, 117 F. R. 13.

VIII.

In regard to the second error assigned by the appellant, the appellee respectfully submits that for the reasons already fully set forth the Circuit Court of Appeals did not err in considering all of the transactions between the bankrupts and the appellee together in determining the effect of the payments received by the appellee upon his

debt, and that for the same reasons there were no "preferential payments" as claimed by the appellant.

IX.

In reply to certain statements made in the appellant's brief, the appellee respectfully submits the following:

(1.) That as already pointed out the decision in Dickson *v.* Wyman, *supra*, is not as claimed by the appellant that an innocently preferred creditor need not surrender his preference, but that in that case, as in this case, no preference was shown.

(2.) That as already pointed out the question whether inquiry as to the occurrence of insolvency may be extended back of a date more than four months prior to the filing of the petition does not arise in this case.

(3.) That the appellant's contention on page 7 of his brief that the payment of $644.28 on Oct. 29, 1901, was not a preference because a payment in full for a single prior unsecured credit applies with equal force to the payments of $289.46 on Sept. 4, 1901, and $657.89 on Sept. 28, 1901, each of which was in full for a prior unsecured credit. The Court in Dickson *v.* Wyman, *supra*, say in substance that it might be contended that, as each payment in that case was the payment of a single sale of merchandise, each credit and its payment constituted a single independent transaction, but that it is better to rest the decision on the broader ground, namely, that as the net result of all the transactions was to increase the indebtedness due the creditor and to correspondingly increase the estate which the bankrupt had at the occurrence of insolvency.

(4.) That as already pointed, the appellant's statements of the appellee's claim on pages 7 and 8 of his brief are arbitrary and artificially made for the purpose of his argument, and his argument is entirely based on the assumption that the payments of September 4 and 28 are preferences — while the appellee contends that this is the very question at issue.

(5.) That in the figures given at the bottom of page 9 of his brief, relative to possible dividends, the appellant does not take into consideration the condition of the estate at the date of the occurrence of insolvency, and arbitrarily assumes that the appellee's debt, upon the basis of which he is to be compared with other creditors of the same class, and his right to share in the estate determined, is $947.35.

(6.) That the appellant's analysis of the claim in the case of McKey *v.* Lee, on page 13 of his brief, is not justified by the reported decision in that case. There is nothing in the report of the case to show whether the payment of $500, made upon October 3, was made before or after the sale upon the same day.

EUGENE M. JOHNSON,
ARTHUR T. JOHNSON,
ALONZO R. WEED,
Counsel for Appellee.